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IN THE
# Supreme Court of the United States
OCTOBER TERM, 1991

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MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR,
*Petitioner*,

v.

DEFENDERS OF WILDLIFE, *et al.*,
*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

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## BRIEF OF AMICUS CURIAE AMERICAN INSTITUTE OF BIOLOGICAL SCIENCES IN SUPPORT OF RESPONDENTS

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## BRIEF OF AMICUS CURIAE AMERICAN INSTITUTE OF BIOLOGICAL SCIENCES IN SUPPORT OF RESPONDENTS

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### INTEREST OF THE AMICUS CURIAE

The American Institute of Biological Sciences (AIBS) is a nonprofit, member-governed national organization whose mission is to address important public policy issues in the life sciences, including environmental, medical and agricultural issues. Founded in 1947 as an operating component of the National Academy of Sciences, AIBS is now an independent federation of 47 scientific societies representing more than 80,000 biologists, students and others concerned with the life sciences.

AIBS provides interdisciplinary advice on topics related to global biological diversity, such as food and fiber production, pest and pathogen management, endangered species protection and habitat preservation, the environmental release of genetically engineered organisms, and the medical use of bioactive compounds. Global biological diversity involves the breadth of the genetic pool crafted by nature over millennia of evolution; the varied plants, animals and microbes that form whole communities; and the range of habitats that stabilize the soil, purify ground water and recycle atmospheric gases.

AIBS seeks to preserve global biodiversity, which is essential not only to scientific and medical research but also to human well-being. AIBS consults with and assists public and private agencies in developing their basic research programs, and serves as a national information center to educate the public as to the importance of global biological diversity.

AIBS files this brief pursuant to Rule 37.3 with the written consents of all parties, which are separately filed.

## SUMMARY OF ARGUMENT

Respondents have standing to enjoin the government's violation of the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*, because they meet Article III injury, traceability and redressability standards. *See, e.g., Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

In enacting the Endangered Species Act, Congress rationally determined, on the basis of persuasive scientific evidence, that loss of worldwide biological diversity results in immediate and direct injury *to all persons.* Congress also found that the actions of federal agencies cause a loss of global biodiversity, and thus constitute a fairly traceable cause of this personal injury. To mitigate such injury, Congress required in Section 7 that federal agen-

cies consult with the Fish and Wildlife Service of the Department of the Interior (FWS) or the National Marine Fisheries Service of the Commerce Department (NMFS) before commencing projects, to ensure that federal actions will not jeopardize endangered species or critical habitat. 16 U.S.C. § 1536(a)(2).

To ensure compliance with Section 7, Congress expressly authorized citizen civil suits, by any person, to enjoin violations of the Act. Section 11(g) provides that "*any person* may commence a civil suit on his own behalf . . . to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision" of the Act. 16 U.S.C. § 1540(g)(1)(A) (emphasis added).

Thus, in enacting the Endangered Species Act, the Congress has reasonably determined that all persons meet all three of the factual requisites for standing: all persons suffer personal injury from loss of biodiversity; that injury is incontestably traceable to unchecked federal agency actions violative of the Act; and redress results when courts enjoin violations of the Act pursuant to Section 11(g).

Congress's use of "private attorneys general" to assist in enforcement of statutory duties is a well-established, legitimate legislative mechanism. Moreover, Congress's use of such a mechanism in the Endangered Species Act is rationally related to its factual findings: Congress has determined that all persons are injured by a loss of global biodiversity; under Section 11(g), any person may sue to enjoin a violation causing such injury.

The Court may, of course, disregard any congressional finding that is arbitrary or irrational, or invalidate any legislative remedy that violates a fundamental Constitutional right. However, where, as here, Congress has made reasonable factual findings with respect to injury, traceability, and redressability, and has created an enforce-

ment mechanism rationally related to those findings, the Court should accord substantial deference to such findings and to the clear congressional intent to provide for broad citizen enforcement of the Act.

Standing law is "founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975). Here, the separation of powers principle compels judicial deference to the well-grounded congressional factual findings manifest in the Act. To preserve this principle, the Court should give effect to Section 11(g) as Congress wrote it and affirm respondents' standing to maintain this lawsuit.

## ARGUMENT

### I. THE ENDANGERED SPECIES ACT ESTABLISHES ALL THREE REQUISITES FOR STANDING

For standing to sue in federal court, a person must show that he or she:

> personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant . . . and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision," . . . .

*Valley Forge*, 454 U.S. at 472 (citations omitted). The Article III test is thus a factual inquiry. In enacting and reauthorizing the Endangered Species Act, Congress made reasonable legislative factual findings, based on overwhelming evidence, that address the three factual requisites of standing.

#### A. The Loss of Global Biodiversity Injures All Persons

For purposes of standing, the alleged injury must be "distinct and palpable," *Warth* v. *Seldin*, 422 U.S. at 501. Congress has determined, on the basis of relevant scientific evidence, that such injury results to all persons when

endangered species are jeopardized, resulting in a loss of global biodiversity.

In promulgating and reauthorizing the Act, Congress expressly found that global biodiversity is an immensely valuable resource that is rapidly being depleted as the result of human activity. Congress concluded that because this resource is finite and essentially irreplaceable, its depletion causes injury to all persons:

> From all evidence available to us, it appears that the pace of disappearance of species is accelerating. As we homogenize the habitats in which these plants and animals evolved . . . we threaten their—and our own—genetic heritage.
>
> The value of this genetic heritage is, quite literally, incalculable.[1]
>
> * * * *
>
> Consideration of this need to protect endangered species goes beyond the esthetic . . . . [M]any of these animals perform vital biological services to maintain a "balance of nature" within their environments. Also revealed was the need for biological diversity for scientific purposes.[2]
>
> * * * *
>
> From the most narrow possible point of view, it is in the best interests of mankind to minimize the

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[1] House Comm. on Merchant Marine and Fisheries, Endangered and Threatened Species Conservation Act of 1973, H.R. Rep. No. 412, 93d Cong., 1st Sess. 4 (1973), *reprinted in* Senate Comm. on Environment and Public Works, A Legislative History of the Endangered Species Act of 1973, As Amended in 1976, 1977, 1978, 1979, and 1980, 97th Cong., 2d Sess. 143 (1982) [hereinafter 1982 Legislative History].

[2] Senate Comm. on Commerce, Endangered Species Act of 1973, S. Rep. No. 307, 93d Cong., 1st Sess. 2, *reprinted in* 1973 U.S.C.C.A.N. 2989, 2990 and *reprinted in* 1982 Legislative History, *supra* note 1, at 301.

losses of genetic variations. The reason is simple: they are potential resources.[3]

* * * *

[I]t is important to understand that the contribution of wild species to the welfare of mankind in agriculture, medicine, industry, and science have been of incalculable value. These contributions will continue only if we protect our storehouse of biological diversity . . . .

. . . .

[O]ur wild plants and animals are not only uplifting to the human spirit, but they are absolutely essential—as a practical matter—to our continued healthy existence.[4]

Congress promulgated the Act because of the injury suffered by all persons when global biodiversity is lost:

The ultimate goal of the Endangered Species Act is to maintain a diversity of species and to preserve in their natural ecosystems both endangered and threatened species.[5]

* * * *

[M]uch of the criticism directed against the Endangered Species Act is based on the belief that the

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[3] House Comm. on Merchant Marine and Fisheries, Endangered and Threatened Species Conservation Act of 1973, H.R. Rep. No. 412, 93d Cong., 1st Sess. 5 (1973), *reprinted in* 1982 Legislative History, *supra* note 1, at 144.

[4] 128 Cong. Rec. 26,189 (1982) (statement of Rep. Evans). *See also* 119 Cong. Rec. 30,162 (1973) (statement of Rep. Sullivan), *reprinted in* 1982 Legislative History, *supra* note 1, at 192-93.

[5] Senate Comm. on Commerce, Endangered Species Act of 1973 Reauthorization, S. Rep. No. 837, 94th Cong., 2d Sess. 2 (1976), *reprinted in* 1982 Legislative History, *supra* note 1, at 518. *See also* House Comm. on Merchant Marine and Fisheries, Endangered Species Act Authorization, H.R. Rep. No. 887, 94th Cong., 2d Sess. 2 (1976), *reprinted in* 1982 Legislative History, *supra* note 1, at 496.

> act puts the interests of "obscure" species ahead of the interests of man. That belief is erroneous. What the act really puts foremost is the long-term interest of human welfare—and the necessity that mankind is entitled to a habitable environment. This necessitates having a diverse pool of genetic resources to tap for medical, scientific, economic and other purposes.[6]
>
> * * * *
>
> I think we all understand the importance of continued support for the Endangered Species Act. It remains the Nation's—indeed the world's—most important law for the preservation of biological diversity.[7]

In short, Congress found that all persons are "distinctly and palpably" injured by the loss of global biodiversity. The fact that this personal injury is suffered by everyone does not lessen it or mitigate its sufficiency for Article III standing. "[T]he fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process." *Sierra Club* v. *Morton*, 405 U.S. 727, 734 (1972). *See also United States* v. *SCRAP*, 412 U.S. 669, 686 (1973).[8]

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[6] 124 Cong. Rec. 38,126 (1978) (statement of Rep. Dingell), *reprinted in* 1982 Legislative History, *supra* note 1, at 809.

[7] 133 Cong. Rec. 5,030 (1987) (statement of Sen. Moynihan). *See also* 128 Cong. Rec. 12,958 (1982) (statement of Rep. Forsythe).

[8] Any "prudential" concern about exercising jurisdiction over a "'generalized grievance' shared in substantially equal measure by all or a large class of citizens," *Warth* v. *Seldin*, 422 U.S. at 499, is eliminated when the suit is brought pursuant to statutory authorization. *Id.* at 501. *See also Gladstone, Realtors* v. *Bellwood*, 441 U.S. 91, 100 (1979); *Bread Political Action Committee* v. *Federal Election Commission*, 455 U.S. 577, 584 (1982); *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 372 (1982). Moreover, respondents also assert injury to their aesthetic and professional interests—as well as injury from the loss of global biodiversity.

This congressional finding of injury was based on persuasive scientific evidence.[9] It accords with a broad consensus in the scientific community that global biological diversity has incalculable value and that all persons are injured when that diversity is threatened. For example, a 1990 report by the Science Advisory Board to the Environmental Protection Agency concludes that "Species Extinction and Overall Loss of Biological Diversity" is one of the four highest-risk environmental problems facing the world.[10] A 1989 report commissioned by the National Science Foundation concludes that:

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[9] Typical of the extensive scientific testimony that Congress considered in making its factual determinations is that of Dr. Thomas Eisner, Division of Biological Sciences, Cornell University:

> It has been estimated that fully 40% of all prescriptions written in the United States contain as their chief ingredients compounds derived from plants, including lower plants. It was through exploration of nature that these drugs were discovered. . . . [M]any of the most interesting plant drugs in current use were only recently discovered, including for example some of the antileukemic compounds, and anticancer drugs such as vincristine. used in the treatment of Hodgkin's disease. There is no end to the potential for discovery in nature, because we have only begun the chemical exploration of nature.

*Endangered Species Act Oversight: Hearings Before the Subcom. on Environmental Pollution of the Senate Comm. on Environment and Public Works*, 97th Cong., 1st Sess. 368 (1981). *See also id.* at 366 (statement of Edward O. Wilson, Baird Professor of Science, Harvard University); *Endangered Species Conservation Act of 1972: Hearings on S. 249, S. 3199 and S. 3818 Before the Subcomm. on the Environment of the Senate Comm. on Commerce*, 92d Cong., 2d Sess. 146-49 (1972) (statement of Dr. F. Raymond Fosberg, botanist).

[10] EPA Science Advisory Board, *Reducing Risk: Setting Priorities and Strategies for Environmental Protection* 13 (1990). This report was prepared by a special committee of the Science Advisory Board, "composed of 39 distinguished scientists and other experts from academia, state government, industry, and public interest groups." *Id.* at ii.

> We are at a critical juncture for the conservation and study of biological diversity: such an opportunity will never occur again. Understanding and maintaining that diversity is the key to humanity's continued prosperous and stable existence on Earth.
>
> The extinction event that we are witnessing is the most catastrophic loss of species in the last 65 million years . . . .
>
> . . . .
>
> The loss of biological diversity is important because human existence depends on the biological resources of the earth. Human prosperity is based very largely on the ability to utilize biological diversity: to take advantage of the properties of plants, animals, fungi, and microorganisms for food, clothing, medicine, and shelter.[11]

The Council on Environmental Quality agrees that preserving biodiversity yields "practical and tangible benefits" for each of us.[12] The NMFS warns that effective enforcement of the Act is necessary "to preserve the world's genetic heritage for future generations." [13] The

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[11] Committee on International Science, Task Force on Global Biodiversity, National Science Board, *Loss of Biological Diversity: A Global Crisis Requiring International Solutions* 1 (1989).

[12] *Hearings on H.R. 2082 and H.R. 858 Before the Subcomm. on Environment of the House Comm. on Science, Space and Technology*, 102d Cong., 1st Sess. (1991) (unpublished statement of Michael R. Deland, Chairman, Council on Environmental Quality, Executive Office of the President, p. 4).

[13] "Preserving such species and their ecosystems is important for maintaning genetic diversity, which provides living organisms with the capability to acclimate and adapt to a changing physical environment. Effective implementation of the Endangered Species Act must continue if we are to preserve the world's genetic heritage for future generations." *Endangered Species Act: Hearings on Endangered Species Act Reauthorization and Oversight Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 97th Cong., 2d Sess. 474 (1982) (statement of William H. Steven-

Department of State agrees that each of us has an "explicit interest" in protecting the "global stock of irreplaceable genetic material":

> Recent well publicized break-throughs in genetic engineering may be what is required to focus public attention on *the explicit interest each one of us has* in seeing that the global stock of irreplaceable genetic material isn't squandered. This may help us focus attention on the practical need to conserve our biological resources.[14]

Thus the Endangered Species Act is based on a rational congressional finding—indeed, a universally shared scientific judgment—that global biodiversity bestows practical and tangible benefits to all persons, and therefore the loss of global biodiversity causes "distinct and palpable" injury to all persons. That injury, obvious to the world's scientific community, constitutes injury for purposes of the Article III standing test.

### B. Federal Agency Action is a Traceable Cause of This Injury

The second factual prong of the standing test is traceability, that is, a "causal connection between the assertedly unlawful conduct and the alleged injury." *Allen* v. *Wright*, 468 U.S. 737, 753 n.19 (1984). In promulgating the Endangered Species Act, Congress found that ill-

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son, Deputy Administrator for Fisheries, National Marine Fisheries Service).

[14] Agency for International Development, Department of State, Department of Agriculture, Department of Commerce, Department of the Interior, Council on Environmental Quality, Smithsonian Institution, National Science Foundation, and the U.S. Man and the Biosphere Program, *Proceedings of the U.S. Strategy Conference on Biological Diversity* 10 (1981) (statement of James L. Buckley, Under Secretary of State for Security Assistance, Science and Technology, U.S. Department of State), *reprinted in Endangered Species Act Oversight: Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works*, 97th Cong., 1st Sess. 303 (1981) (emphasis added).

considered action of federal agencies—action taken without prior consultation with FWS or NMFS—is a significant cause of the loss of global biodiversity, and thus injury to all. This finding is evident from the inclusion of Section 7 in the Act, which mandates consultation with FWS or NMFS:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species . . . .

16 U.S.C. § 1536(a)(2). Section 7 has been called the "most important" aspect of the Act—indeed, its "heart." [15] Congress has found that the consultation process has been effective in modifying agency action and mitigating the loss of global biodiversity.[16] The Executive Branch agrees.[17]

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[15] The consultation process is "one, if not the most important, aspect of the act." 124 Cong. Rec. 21,148 (1978) (statement of Sen. Chafee), *reprinted in* 1982 Legislative History, *supra* note 1, at 996. "The heart of the 1973 act is section 7." 124 Cong. Rec. 21,142 (1978) (statement of Sen. Nelson), *reprinted in* 1982 Legislative History, *supra* note 1, at 982.

[16] *See, e.g.*, House Comm. on Merchant Marine and Fisheries, Endangered Species Act Amendments, H.R. Rep. No. 567, 97th Cong., 2d Sess. 24, *reprinted in* 1982 U.S.C.C.A.N. 2807, 2824; 124 Cong. Rec. 38,126 (1978) (statement of Rep. Dingell), *reprinted in* 1982 Legislative History, *supra* note 1, at 809.

[17] *Endangered Species Act: Hearings on Endangered Species Act Reauthorization and Oversight Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 97th Cong., 2d Sess. 229, 349, 528 (1982) (statements of Ronald Lambertson, Associate Director, Federal Assistance, U.S. Fish and Wildlife Service, Department of the Interior; Richard Roe, Acting Director, Office of Marine Mammals and Endangered Species, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce; issue papers of Dr. Eugene Hester,

The Court has set a "substantially likely" standard of proof of causation in the standing context. *Duke Power* v. *Carolina Environmental Study Group*, 438 U.S. 59, 74-75 (1978). Here, where the injury results from loss of global biodiversity, it is not necessary to show that respondents will be injured by a particular federal agency action endangering a particular species on a particular plot of land. Congress has clearly and reasonably determined that *any* federal agency action subject to Section 7 taken without consultation will likely lead to a reduction in the net variety of species globally, and thus cause "distinct and palpable" injury.

### C. Compliance with Section 7 of the Act Redresses This Injury

The third factual prong of the standing test "examines the causal connection between the alleged injury and the judicial relief requested." *Allen* v. *Wright*, 468 U.S. at 753 n.19. Here the connection could not be clearer: if injury occurs as a result of the failure of federal agen-

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Deputy Director, U.S. Fish and Wildlife Service, Department of the Interior); *Endangered Species Act Oversight: Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works*, 97th Cong., 1st Sess. 76-77 (1981) (statement of Robert Jantzen, Director, U.S. Fish and Wildlife Service, Department of the Interior); *Endangered Species Act: Hearings on H.R. 1027 Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 99th Cong., 1st Sess. 18, 26 (1985) (statements of Robert Jantzen, Director, U.S. Fish and Wildlife Service, Department of the Interior; William Gordon, Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration, U.S. Department of Commerce); *Reauthorization of the Endangered Species Act: Hearings on S. 675 Before the Subcomm. on Environmental Protection of the Senate Comm. on Environment and Public Works*, 100th Cong., 1st Sess. 16-17, 88 (1987) (statements of Frank Dunkle, Director, U.S. Fish and Wildlife Service; William Evans, Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration, U.S. Department of Commerce).

cies to consult with FWS and NMFS—the federal experts on endangered species and habitat—that injury is cured when Section 7 consultations are conducted.

Congress has found the Section 7 consultative process to be effective in minimizing the adverse impact of federal agency action on endangered species, and hence on global biodiversity. *See supra* p. 11. The Section 7 consultative procedure is no mechanical formality.[18] Agencies follow the recommendations of FWS or NMFS in the vast majority of cases. *See, e.g.*, H.R. Rep. No. 467, 100th Cong., 1st Sess. 4 (1987). In fact, an agency which ignores a "jeopardy opinion" can be compelled to modify its actions. *See, e.g., TVA* v. *Hill*, 437 U.S. 153 (1978).

Plaintiff need only show a "substantial likelihood" that the relief requested will redress the injury claimed. *Duke Power*, 438 U.S. at 75. The joint regulations challenged in this lawsuit fail to require federal agencies to consult with FWS and NMFS about the overseas effects of their actions. Compelling the Department to amend its regulations will surely result in such consultation in compliance with Section 7, and thus in less loss of global biodiversity, and thus in less injury to respondents and others.[19] Therefore, an injunction directing petitioner

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[18] Petitioner argues that respondents' injury is not redressable because FWS and NMFS recommendations are not binding on action agencies. *See* Petitioner's Brief at 25. However, this argument ignores the explicit requirements of Section 7. Agencies are forbidden to "make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures" formulated by the Secretary of Interior during Section 7 consultations. 16 U.S.C. § 1536 (d). Furthermore, there would be no reason for the extensive exemption procedures in Section 7(e)-(p) if an agency could simply ignore the recommendations of FWS or NMFS. 16 U.S.C. § 1536(e)-(p).

[19] Petitioner argues that respondents' injury is not redressable because some agency actions are part of multi-donor international

Secretary of Interior to comply with Section 7, and consult with other federal agencies concerning the overseas effects of their actions, is "substantially likely" to redress respondents' injury as defined by the Act.

## II. SEPARATION OF POWERS COMPELS JUDICIAL DEFERENCE TO THE DETERMINATION BY CONGRESS IN SECTION 11(g) THAT ALL PERSONS MAY ENFORCE THE ACT

"[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers." *Allen* v. *Wright*, 468 U.S. at 752. Standing limits are designed to assure that courts do not intrude upon matters within the Constitutional ambit of the Legislature or the Executive—to prevent an "overjudicialization of the processes of self-governance." [20] Standing law is thus perverted when invoked by the courts to amend a statute judicially or to bar the Legislature from doing what it clearly and validly intended to do by statute.

Here petitioner asks the Court to rewrite Section 11(g) of the Act, in the name of separation of powers. Section 11(g), the "citizen suits" provision of the Act, provides for enforcement suits by "any person":

> [A]ny person may commence a civil suit on his own behalf . . . to enjoin any person, including the United States and any other governmental instrumentality

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development projects. *See* Petitioner's Brief at 26-27. However, one need look no further than footnote 12 of petitioner's brief for proof that agencies are quite capable of working with the host government or other donors to change a project to minimize any adverse impacts on biodiversity. Petitioner describes how A.I.D. influenced the governments of Sri Lanka and Peru to modify original project designs to minimize adverse effect on biodiversity. Petitioner also concedes that A.I.D. found it useful to confer with FWS in its attempt to reduce such adverse effect. *Id.* at 22.

[20] Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 881 (1983).

> or agency . . . who is alleged to be in violation of any provision of [the Act] . . . .

16 U.S.C. § 1540(g)(1)(A). The plain language of Section 11(g) surely constitutes a legislative decision that a violation of the Act, such as a violation of Section 7 by the Secretary of Interior, should be enjoined by the Courts in response to a complaint by "any person".[21] Congress provided this private enforcement to ensure that the important public purpose of the Endangered Species Act would be fulfilled. Nullification of Section 11 would result in *pro tanto* nullification of Section 7, since the government is unlikely to challenge its own failure to obey Section 7.

Congressional intent to enlist "private attorneys general" to assure compliance with the Act is evident from the face of the Act. A citizen's action may not be brought under Section 11(g) if the Secretary of Interior has already commenced a civil action or the United States has commenced (and is "diligently prosecuting") a criminal action with respect to the alleged violation. 16 U.S.C. § 1540(g)(2)(A). It is also evident from the legislative history of the Act:

> [Section 11(g)] authorizes citizen actions to enforce the provisions of the Act. It allows any person, including a Federal official, to seek remedies involving

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[21] Petitioner's claim that respondents do not have a cause of action under Section 11(g) because the Secretary of Interior is not violating the Act is incorrect. *See* Petitioner's Brief at 29. Section 7 requires that federal agencies consult with the Secretary of Interior regarding the effect of agency actions on endangered species. 16 U.S.C. § 1536(a)(2). The Secretary's refusal to engage in such consultations with respect to agency actions that may affect endangered species overseas constitutes a clear violation of the Act. Moreover, petitioner's claim is immaterial to the standing issue, since "standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal . . . ." *Warth* v. *Seldin*, 422 U.S. at 500.

> injunctive relief for violations or potential violations of the Act.[22]

As has been shown, Congress found that all persons are injured by a loss of global biodiversity, and that ill-considered federal agency action causes such a loss. *See supra*, sections I.A., I.B. It was thus entirely reasonable for Congress to authorize "any person" to sue to enjoin such an injury and violation of the Act.

When Congress intends to create a statutory cause of action for a limited class of persons, the statute set forth these limitations.[23] Here, however, for good reason, Congress intended that *any* person might sue for *any* violation of the Act. The citizen suits provision is thus rationally related to Congress's factual determination that all persons are injured by a loss of global biodiversity.

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[22] House Comm. on Merchant Marine and Fisheries, Endangered and Threatened Species Conservation Act of 1973, H.R. Rep. No. 412, 93d Cong., 1st Sess. 19 (1973), *reprinted in* 1982 Legislative History, *supra* note 1, at 158. This report also notes that:

> [t]he language [of section 11(g)] is parallel to that contained in the recent Marine Protection, Research and Sanctuaries Act 1972 ["MPRSA"], and is to be interpreted in the same fashion.

*Id.* The legislative history of the MPRSA indicates that its citizen suits provision, 33 U.S.C. § 1415(g), also was intended primarily as an enforcement mechanism. *See* House Comm. on Merchant Marine and Fisheries, Marine Protection Research and Sanctuaries Act of 1971, H.R. Rep. No. 361, 92d Cong., 1st Sess. 23 (1971); Senate Comm. on Commerce, Marine Protection and Research Act of 1971, S. Rep. No. 451, 92d Cong., 1st Sess. 23, *reprinted in* 1972 U.S.C.C.A.N. 4234, 4249.

[23] For example, the Federal Aviation Act limits suits to "person[s] disclosing a substantial interest in [any order issued by the Secretary of Transportation under the Act]," 49 U.S.C. § 1486(a); the Presidential Election Campaign Fund Act authorizes suits only by "[t]he [Federal Election] Commission, the national committee of any political party, and individuals eligible to vote for President," 26 U.S.C. § 9011(b)(1).

Congressional factual findings deserve judicial deference:

> When Congress makes findings on essentially factual issues . . . those findings are of course entitled to a great deal of deference in as much as Congress is an institution better equipped to amass and evaluate the vast amounts of data . . . .

*Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985). Legislative factual determinations, such as those manifest in Sections 7 and 11 of the Act, are to be honored by the courts unless the finding is "so clearly wrong that it is 'arbitrary,' 'irrational,' or 'unreasonable.'" *Oregon* v. *Mitchell*, 400 U.S. 112, 248 (1970).[24] As has been shown, Congress's factual findings pertinent to the three requisites of standing are clearly rational, reasonable, and non-arbitrary.

Statutorily created regulatory mechanisms—such as the citizen suit enforcement mechanism prescribed in Section 11—are also entitled to deference. The Court has stated, "[W]here we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary . . . our investigation is at an end." *Katzenbach* v. *McClung*, 379

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[24] *See also Board of Educ. of Westside Community Schools* v. *Mergens*, 110 S. Ct. 2356, 2372 (1990) (Court declined to "second guess" legislative judgment that high school students are unlikely to confuse a policy of equal access to public school facilities for student-run religious organizations with state sponsorship of religion, "particularly where the judgments are based in part on empirical determinations"); *Rostker* v. *Goldberg*, 453 U.S. 57, 81-83 (1981) (Court deferred to congressional determination based on extensive testimony that women should not be permitted in military combat positions); *Vance* v. *Bradley*, 440 U.S. 93, 111 (1979) (Court deferred to congressional determination that Foreign Service officers should retire at age 60); *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 152-54 (1938) (Court deferred to congressional finding that "filled milk" is injurious to health).

U.S. 294, 303-04 (1964).[25] "[I]n our constitutional system the commitment to the separation of powers is too fundamental for us to preempt congressional action by judicially decreeing what accords with 'common sense and the public weal.'" *TVA* v. *Hill*, 437 U.S. at 195.

The propriety of using "private attorneys general" to assist in the enforcement of statutes is, of course, well-established. *See, e.g., Agency Holding Corp.* v. *Malley-Duff & Assoc., Inc.*, 483 U.S. 143 (1987); *Trafficante* v. *Metropolitan Life Ins.*, 409 U.S. 205 (1972). The Court routinely recognizes the standing of citizen enforcers even in cases where the injury is defined by statute and would not exist but for the statute. *See, e.g., Havens Realty*, 455 U.S. at 373-374.

Indeed, in so-called "*qui tam*" actions—where the plaintiff (the "informer" or "relator") asserts a claim alleging a statutory violation of a governmental interest—no showing of personal injury stemming from the alleged violation is required. "Statutes providing for actions by a common informer, who himself has no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our Government." *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 541 n.4 (1943) (quoting *Marvin* v. *Trout*, 199 U.S. 212, 225 (1905)).[26]

*Qui tam* actions accord with the separation of powers principle and Article III. *United States ex rel. Wein-*

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[25] *See also Mathews* v. *de Castro*, 429 U.S. 181, 185 (1976) ("Governmental decisions to . . . improve the general public welfare . . . are 'not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise in judgment.'" (quoting *Helvering* v. *Davis*, 301 U.S. 619, 640 (1937))).

[26] *See generally* Caminker, *The Constitutionality of Qui Tam Actions*, 99 Yale L.J. 341 (1989).

*berger* v. *Equifax, Inc.*, 557 F.2d 456 (5th Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978); *United States ex rel. Newsham* v. *Lockheed*, 722 F. Supp. 607 (N.D. Cal. 1989); *United States ex rel. Stillwell* v. *Hughes Helicopters, Inc.*, 714 F. Supp. 1084 (C.D. Cal. 1989). As noted in *Newsham*, "private enforcement initiatives conformed to the Framers' original understanding of the separation of powers secured by the Constitution, as well as the Framers' concept of cases and controversies appropriate for federal court decision." *Id.* at 615. If *qui tam* actions, by persons suffering no injury, comport with Article III and the separation of powers principle, then surely Section 11 enforcement actions—by persons determined by Congress to be injured as a result of unconsidered and unlawful federal agency action—do so.

Denial of standing in this case would limit "the power of the legislature to articulate public values and choose the manner in which they may be enforced." [27] Congress found the Section 7 consultative mechanism to be an effective means of ensuring that federal agencies do not destroy global biodiversity, and determined that Section 11 citizen suits would enforce compliance with Section 7. By denying standing, the Court would be rewriting these key provisions of the Act. The Court would be making legislative policy judgments contrary to the express determinations of Congress and contrary to the very separation of powers principle invoked by petitioner.

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[27] Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 233 (1988).

## CONCLUSION

The decision of the Court of Appeals with respect to standing should be affirmed.

Respectfully submitted,

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